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HAROLD B. WILLEY, Cl

Supreme Court of the United States

OCTOBER TERM, 1953

No. 260

MORRIS KITZEN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

APPELLANT'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MORRIS S. KITZEN
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Proceedings Below

On November 19, 1942, the defendant-appellant was convicted under a general verdict on two distinct offenses —where the evidence under Count 1, false pretenses, was not identical with the evidence under Count 2, common-law larceny by trespass and asportation, where the accused, if there had been sufficient evidence, might have been guilty of one offense or the other but could never have been guilty of both offenses at the same time, and where the conviction under the general verdict was left to conjecture, guesswork, and the definiteness or certainty of the count or counts, offense or offenses, crime or crimes included in the charge could not be supplied long afterwards by the district attorney or anyone else. This important element—certainty

—cannot and could not have been left to conjecture, for it is of the very essence of the law of conviction itself. Without it, the conviction is too indefinite and uncertain and rests upon an uncertain foundation and it is clearly violative of the first essential element of due process of law.

Nature of the Prosecution

The district attorney says, if an objection as to the federal question, had been taken at the time of conviction, the accused could have raised the unconstitutionality of the conviction on appeal to the appellate courts of the State of New York. He contradicts himself when he says that the accused had a right of appeal. The accused was denied a right of appeal by the State.

Under the decisions of the cases by the appellate courts, the accused was barred by the rules of law, was precluded from raising the federal question on appeal in any appellate court. His right to appeal was lost, was extinguished, was lost forever under the following decisions:

People v. *Cummins,* 1912, 153 App. Div. 93, 138 N. Y. S. 517, 28 N. Y. Cr. R. 380, affirmed, 1913, 209 N. Y. 283, 103 N. E. 169, 30 N. Y. Cr. R. 330;

People v. *Dunn,* 1882, 90 N. Y. 104, reversing *Dunn* v. *People,* 27 Hun. 272;

People v. *Sciascia,* 1944, 268 App. Div. 14;

People v. *Sciascia,* 1945, 294 N. Y. 927.

Questions Presented and the Respondent's Position

He does not disclose before this Court the real rule of judicial procedure in criminal prosecutions; that this rule of judicial procedure is a product of judicial decision by the appellate courts of the State of New York and bars an appeal by the accused and that the accused must resort to an application in the nature of a writ of error *coram nobis* to vacate the judgment of conviction.

In his petition and in his brief, the petitioner raises the element of certainty—an essential element composing due process, a right within the meaning of the due process clauses of the 14th Amendment—a federal question under the Constitution.

In the respondent's brief, the district attorney mentions a beautiful phrase from the rules—that there is an adequate and independent non-federal ground—without specifying it before the Court, without telling the Court what it is, where it is, where is the adequacy and where is the independence of the non-federal ground. He wants the Court to look for it, hunt for it, for that actual, practical non-federal ground. This is done with a view to confusing the grounds—to defeat the petitioner's right specially set up and claimed under the Constitution. He fails to point out to the Court in specific language just what is that adequate and independent non-federal ground so that everybody may see it. Paraphrasing the standards set out in the Rules is not enough to show that there is a non-federal ground. Allegations, without facts, mean nothing.

The State may not permit an accused to be denied the essential elements of due process of law without supplying corrective process (*Brown et al v. State of Mississippi*, 1936, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682).

ARGUMENT

A substantial question is presented.

The district attorney further fails to disclose before this Court just what this Court has said about the place where and the time when the federal question could be raised. True, it must be presented to the trial court at the point considered appropriate under state procedure. Under the following cases, this Court has laid down the rules of law concerning the place where and the time when the federal question should be or could be raised, thus:

> *Hulbert* v. *Chicago,* 202 U. S. 275 (complete failure to raise question at trial court level);
> *Brown* v. *Massachusetts,* 144 U. S. 573, 580 (failure to raise question before verdict held to be fatal);
> *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 231-2 (proper to raise question in motion for new trial).

It is proper to raise the federal question upon a motion for a new trial (*Frank* v. *Mangum,* 1915, 237 U. S. 309, 35 S. Ct. 582, 59 L. Ed. 969). It is proper to raise the federal question in the common law writ of error *coram nobis,* which may be issued by the trial court as a remedy for infringement of constitutional right of the defendant in the course of the trial (*Ex Parte Hawk,* 1944, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572).

If this is not done, the Supreme Court will decline to exercise jurisdiction both where the highest state court expressly refuses to decide the federal question for this procedural reason (*Pennsylvania R. Co.* v. *Illinois Brick Co.,* 297 U. S. 447, 462-3; *Erie R. Co.* v. *Purdy,* 185 U. S. 148)

and where the highest state court is completely silent on the federal question (*Mutual Life Ins. Co.* v. *McGrew,* 188 U. S. 291, 309). In the latter instance, the Court assumes, unless it can affirmatively be shown otherwise, that the silence is due to the procedural deficiency. But the Court itself has the power to examine into the raising of the federal question and if it is convinced that the highest state court's refusal to deal with that question is a mere evasion the Court's jurisdiction can be asserted (*Rogers* v. *Alabama,* 192 U. S. 226, 230-1).

He further fails to disclose to this Court that the Court of Appeals of the State of New York has, since 1943, reversed many old cases that have been brought before it on application by defendant-appellant in the nature of a writ of error *coram nobis* to vacate a judgment procured or obtained through a violation of a constitutional right to due process of law.

In the case of *Matter of Lyons* v. *Goldstein,* 1943, 290 N. Y. 19, the Court of Appeals reversed the conviction of 1936. In *People* v. *Richetti,* 1951, 302 N. Y. 290, the Court of Appeals reversed a conviction of 1922. In *People* v. *Langan,* 1952, 303 N. Y. 474, the Court of Appeals reversed a conviction of 1930.

Where the accused had no right of appeal, where for any other reason an appeal would not furnish a remedy, where an appeal to a higher court for error at the trial and appearing in the record was not available, where a motion to vacate the judgment and for a new trial for defect not appearing on the record was not available, he could avail himself of the common law writ of error *coram nobis* recognized and employed in the State of New York; and until that remedy has been sought without avail we cannot say that petitioner's state remedies have been exhausted (*Ex Parte Hawk, supra*).

Although there is indefiniteness, uncertainty, although the conviction is void for uncertainty, although it violates the first essential element of due process of law according to the decision in the case of *Guenther* v. *People*, 1861, 24 N. Y. 100, and according to the decisions of cases by this Court cited in the Petition and in the Brief, although there is a conflict with another appellate court—a conflict between a decision of the highest state court and that of the Supreme Court on matters of federal law (an important element of due process of law) and there is an important question of substance, an actual, practical effect of a disputed decision, and its consequences for other litigants and in other situations, and that the question involved be decided finally by the Supreme Court, not just because the decision below is or may be erroneous, the district attorney seeks herein to deny to the accused:

1) the right of appeal to a higher court for error at the trial and appearing in the record;

2) a motion to vacate the judgment and for a new trial for defect not appearing on the record; or

3) where for any other reason an appeal would not furnish a remedy.

He closes all doors to the accused and shuts all proceedings that are open to an accused in this State. Where the accused had no right of appeal, and the conviction procured through a violation of a constitutional right to due process of law cannot otherwise be reached by judicial review or is not otherwise subject to judicial review, he has a right to make an application for a writ of error *coram nobis*—a corrective process supplied by the State of New York

since 1943 and he has a right to raise the federal question in such application or motion to vacate and set aside the judgment of conviction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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